

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2008-0028

AGENCY DECISION DISMISSING COMPLAINT

**IN THE MATTER OF THE COMPLAINT FILED BY COLORADO ETHICS WATCH
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
SENATE MAJORITY FUND, LLC AND COLORADO LEADERSHIP FUND, LLC.**

This matter is before the Administrative Law Judge (ALJ) upon the complaint of Colorado Ethics Watch (CEW) that the Senate Majority Fund (SMF) and Colorado Leadership Fund (CLF) failed to comply with registration requirements, contribution limits, and disclosure requirements applicable to political committees. SMF and CLF deny that they are political committees and jointly move to dismiss the complaint for failure to state a claim upon which relief may be granted. The parties' briefing was completed November 21, 2008 and the matter is now ripe for decision. For the reasons explained below, the ALJ finds that SMF and CLF are not political committees, and therefore have not committed the violations alleged by CEW.

Background

CEW alleges that during the run-up to the November 2008 general election, SMF and CLF purchased campaign advertisements that expressly identified specific candidates, expressly stated they were running for election to a particular office, took a position on the candidates' character, qualifications and fitness for office, and stated what the candidates would do once in office. CEW contends that the content of these advertisements amounts to "express advocacy" that renders SMF and CLF "political committees" as defined in the Colorado constitution. As such, CEW says that SMF and CLF failed to comply with several obligations required of political committees, including registration, contribution limits and reporting of independent expenditures, and are therefore subject to civil penalties.

The Colorado constitution defines a "political committee" as a group that has "accepted or made contributions or expenditures in excess of \$200 to support or oppose the nomination or election of one or more candidates." Colo. Const. art. XXVIII, § 2(12)(a). CEW contends that SMF and CLF are political committees because they expended more than \$200 to produce the ads. Pursuant to Colo. Const. art. XXVIII, § 2(8)(a), an "expenditure" is a payment of money by any person for the purpose "expressly advocating" the election or defeat of a candidate. Although the ads did not use express words of advocacy, such as "vote for," "elect," "support," or "cast your ballot for," CEW contends they were the "functional equivalent" of express advocacy and therefore qualify as expenditures.

SMF and CLF do not contest that they produced and distributed the ads in question. However, they contend that under controlling U.S. Supreme Court and Colorado case law, the ads do not expressly advocate the election of any candidate, and therefore are not expenditures. Because they made no expenditures, they are not subject to regulation as political committees.

The issue thus boils down to the definition of the phrase “expressly advocating,” as that term is used in the Colorado constitution. For reasons explained below, the ALJ adopts the definition set forth in *League of Women Voters of Colorado v. Davidson*, 23 P.3d 1266 (Colo. App. 2001). That definition looks at whether the communications “expressly advocate the election or defeat of a clearly identified candidate,” and focuses upon “express words of advocacy, not express images, symbols, or contexts of advocacy.” *Id.* Employing that narrow definition, the ALJ must conclude that the ads in question were not express advocacy and therefore SMF and CLF are not political committees.

Discussion

Colorado’s Campaign Finance Laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again substantially revised by initiative in 2002 as the result of the adoption of Article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

Standard applicable to this motion

Colo. Const. art. XXVIII, § 9(1)(f) directs that hearings of alleged fair campaign law violations be conducted according to the provisions of the Administrative Procedure Act, § 24-4-105, C.R.S. That section, in turn, adopts the district court civil rules of practice, to the extent practicable. Section 24-4-105(4). Rule 12(b)(5) of the Colorado Rules of Civil Procedure permits a defendant to seeking dismissal of a complaint for “failure to state a claim upon which relief can be granted.” SMF and CLF contend that because they are not political committees, the complaint does not state a proper claim for relief and it should be dismissed.

A 12(b)(5) motion to dismiss for failure to state a claim must be decided solely upon the basis of the allegations in the complaint. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995). The allegations are to be construed strictly against the moving party. *Abts v. Board of Education of School District RE-1*, 622 P.2d 518 (Colo. 1980). The ALJ must accept the material allegations as true. *Rosenthal, supra*;

Douglas County Nat'l Bank v. Pfeiff, 809 P.2d 1100 (Colo. App. 1991). Because the ALJ must accept the allegations as true and draw all inferences in favor of the plaintiff, the ALJ is not permitted to make findings of fact but may only make conclusions of law. *Medina v. State*, 35 P.3d 443 (Colo. 2001).

Motions to dismiss for failure to state a claim are viewed with disfavor. *Rosenthal, supra*; *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992). The motion will be granted only if it appears beyond doubt that the complainant can prove no set of facts that would entitle him to relief. *Rosenthal, supra*; *Kratzer v. Colorado Intergovernmental Risk Share Agency*, 18 P.3d 766 (Colo. App. 2000).

The Advertisements

The ALJ accepts as true, for the purposes of this motion, CEW's allegation that SMF and CLF produced and distributed the political advertisements described in the complaint and attached thereto. SMF's ads are attached to the complaint as Exhibit C and G, and CLF's ads are attached to the complaint as Exhibit D. The ALJ also accepts as true the allegations that SMF and CLF each spent over \$200 to purchase the ads, that the purchases were not controlled by or coordinated with the candidates and were therefore "independent," and that a major purpose of both SMF and CLF was the election of candidates for public office in Colorado.¹

Included in Exhibit C are ads for Lauri Clapp, Shawn Mitchell, Libby Szabo, and Robert John Hadfield, all candidates for state Senate. Included in Exhibit D are ads for John Bodnar, Holly Hansen, Spencer Swalm, Dave Kerber, Ken Summers, and Randy Baumgardner, all candidates for the state House of Representatives. All but one of the ads is in the form of a written mailer. One ad was televised.

Each ad shares the following characteristics:

1. It identifies the candidate by name and picture;
2. It identifies the office for which the candidate is running;
3. It summarizes the candidate's qualifications;
4. It summarizes some of the key issues the candidate supports or opposes;
5. It summarizes what the candidate will do when elected to office;
6. It invites the voter to contact and thank the candidate for his or her efforts.

None of the ads, however, employ words or phrases specifically exhorting the reader to "vote for," "elect," "support," or "cast your ballot for" a candidate, or the like.²

¹ To be subject to regulation as a political committee, the committee must have a major purpose of influencing elections. *Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964 (Colo. App. 2007); *Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137 (10th Cir. 2007).

² One ad states, "Local leaders endorse Dave Kerber."

The Express Advocacy Test

CEW alleges that SMF and CLF are political committees because they have made expenditures expressly advocating the election of candidates. An “expenditure” is defined by Colo. Const. art. XXVIII, § 2(8)(a) as “any purchase, payment ... or gift of money by any person for the purpose of *expressly advocating* the election or defeat of a candidate.” *Italics* added. For the purposes of this motion, there is no dispute that SMF and CLF are “persons” within the meaning of the Colorado constitution, nor any dispute that SMF and CLF purchased the ads in question.³ The sole issue is whether the ads “expressly advocate” the candidates’ election.

The express advocacy test was first announced in the seminal case of *Buckley v. Valeo*, 424 U.S. 1 (1976), which dealt with challenges to the Federal Election Campaign Act of 1971 (FECA). In *Buckley*, the Supreme Court held that regulation of expenditures made to purchase communications “relative to a clearly identified candidate” was unconstitutionally vague unless the communication “in express terms advocate[d] the election or defeat of a clearly identified candidate.”⁴ *Id.* at 44. In the Court’s opinion, the phrase “relative to” a candidate “fails to clearly mark the boundary between permissible and impermissible speech.” *Id.* at 41. Even if “relative to” is interpreted to mean “advocating the election or defeat of” a candidate, it is still unconstitutionally infirm because “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application” and therefore “such a distinction offers no security for free discussion.” *Id.* at 43. The Court therefore adopted the objective “express advocacy” test to preserve the law from being unconstitutionally vague. *Id.* at 44. In a footnote, the Court set forth what has since become known as the “magic words” test: “This construction would restrict application of [FECA] to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 44, n. 52.

Ten years after *Buckley*, the Supreme Court reaffirmed the validity of the express advocacy requirement in *Federal Election Commission v. Massachusetts Citizens for Life* (“MCFL”), 479 U.S. 238 (1986). In the Court’s words, “Buckley adopted the ‘express advocacy’ requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of ‘express advocacy’ depended upon the use of language such as ‘vote for,’ ‘elect,’ ‘support,’ etc.” *Id.* at 249. Using the express advocacy test, the Court found that a newsletter exhorting readers to “VOTE PRO-LIFE” and picturing candidates identified to be pro-life, was express advocacy even though marginally less direct than the words, “Vote for Smith.” *Id.*

In 2000, the 10th Circuit in *Citizens for Responsible Government v. Davidson*, 236

³ A “person” means any natural person, partnership, committee, association, corporation, labor organization, political party, or other organization or group of persons.” Colo. Const. art. XXVIII, § 2(11).

⁴ Assuming the expenditure was “independent” in that it was not controlled by or coordinated with the candidate. Expenditures that are not independent are subject to regulation as contributions. *Id.* at 46.

F.3d 1174 (10th Cir. 2000) found unconstitutional a provision of the FCPA that defined an independent expenditure as one “advocating the election or defeat of a candidate ... includ[ing] expenditures for political messages which unambiguously refer to any specific ... candidate.” Relying upon *Buckley* and *MCFL*, the court stated, “express words of advocacy were not simply a helpful way to identify ‘express advocacy,’ but that the inclusion of such words was constitutionally required.” *Id.* at 1187.

The next year, the Colorado Court of Appeals in *League of Women Voters, supra*, agreed that regulation of independent expenditures used for communications is permissible only if the communications “expressly advocate the election or defeat of a clearly identified candidate,” either by the words and phrases listed in *Buckley* or “other substantially similar or synonymous words.” The Court recognized that though this approach permits the relatively easy circumvention of the law, “it strikes an appropriate balance between trying to preserve the goals of campaign finance reform and, at the same time, protect political speech.” *Id.*

League of Women Voters has not been overruled or criticized by any Colorado court, and thus remains the law in Colorado today. Although the fair campaign finance and practice laws were subsequently subsumed by Article XXVIII when it was adopted in 2002, the electorate did not turn its back on the express advocacy test but specifically adopted it as part of the definition of “expenditure.” The electorate is presumed to know the existing law at the time they amend or clarify that law. *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000); *Alliance for Colorado’s Families v. Gilbert*, 172 P.3d 964, 968 (Colo. App. 2007). Therefore, it is reasonable to conclude that when the electorate adopted the phrase “expressly advocating” as part of the definition of expenditure in § 2(8)(a), it meant to adopt that term as defined by *Buckley*, *MCFL*, and *League of Women Voters*.

Subsequent to adoption of Article XXVIII, Colorado has continued to recognize a narrow express advocacy test. See *Alliance for Colorado’s Families, supra* at 970 (“a communication constitutes express advocacy if it contains an exhortation that urges voters to take action and identifies specific candidates”); see also, *Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137, 1140 n. 2 (10th Cir. 2007)(per *Buckley*, express advocacy means “express terms advocat[ing] the election or defeat of a clearly identified candidate ... such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘[Candidate’s name] for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’”) The ALJ therefore concludes that the test announced in *League of Women Voters* remains the law that must be applied to this case.

CEW argues that since *Buckley*, *MCFL*, and *League of Women Voters*, the concept of “express advocacy” has evolved from the rigid “magic words” test of *Buckley* to include the “functional equivalent of express advocacy.” Response Brief, pp. 5-6. Specifically, CEW relies upon the more recent Supreme Court cases of *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003) and *Wisconsin Right to Life v. Federal Election Comm’n*, ___ U.S. ___, 127 S.Ct. 2652 (2007).

CEW points out that in *McConnell*, the Court criticized *Buckley*'s "magic words" test as "functionally meaningless," and upheld a federal restriction of "electioneering communications" against a challenge to its facial constitutionality.⁵ In the Court's view, the federal restriction upon electioneering communications was not subject to the same vagueness concerns that existed in *Buckley* because the term "electioneering communications" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners." *Id.* The Court therefore found that "although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id.* CEW draws from this that *McConnell* replaced *Buckley*'s rigid test with a more "functional" one.

According to CEW, *Wisconsin Right to Life* ("WRTL") describes the specifics of this new functional test. In *WRTL*, the Court addressed an as applied challenge to BCRA's restrictions upon electioneering communications. The Court, referring to *McConnell*, acknowledged that it had "already ruled that BCRA survives strict scrutiny to the extent it regulates advocacy or its functional equivalent." *Id.* In sustaining the as applied challenge, the Court went on to say that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* This is the test CEW urges the ALJ to apply in this case.

The ALJ cannot agree with CEW that the term "expressly advocating," as used in Article XXVIII's definition of expenditure, has been modified *sub silentio* by *McConnell* and *WRTL*. There are several reasons for this conclusion.

First, *McConnell* and *WRTL* specifically address the narrow issue of BCRA regulation of electioneering communications. As noted in *McConnell*, the Court relied upon BCRA's narrow definition of electioneering communications as a reason why vagueness was not a concern and thus the *Buckley* test of express advocacy was not constitutionally required. The case before the ALJ is not one involving the narrow issue of electioneering communications, but rather one involving the broad field of "expenditures." *McConnell* and *WRTL* simply do not apply in this context. Because the communications subject to regulation in this case fall into the broad definition of "expenditures," there is a need to apply a narrow test to preserve the regulation from being unconstitutionally vague. Restrictions on independent expenditures "represent substantial ... restraints on the quantity and diversity of political speech," and thus must be narrowly construed. *Buckley*, *supra* at 19-21.

Second, *McConnell* and *WRTL* were decided well after the Colorado electorate had adopted a definition of expenditure that included the phrase, "expressly advocating the election or defeat of a candidate." At the time the electorate adopted this language,

⁵ The law in question was the Bipartisan Campaign Reform Act of 2002 (BCRA).

express advocacy had a meaning well established by *Buckley*, *MCFL*, and *League of Women Voters*. There is no indication the electorate intended to turn its back on that established jurisprudence and adopt an evolving definition of express advocacy. Perhaps the best indication of the electorate's intent is the "Purpose and findings" section of Article XXVIII, § 1. That section, though somewhat expanded from the "Legislative declaration" of the old FCPA, contains no hint that the electorate intended to depart from *Buckley*, *MCFL* and *League of Women Voters*' narrow construction of express advocacy. Most of the new language in the purpose and findings statement relates to "the advent of significant spending on electioneering communications," and the need to regulate that form of advertising. However, as noted previously, electioneering communications are not at issue in this case.

Third, *League of Women Voters* considered, but specifically rejected, a functional equivalency test as adopted by *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). In *Furgatch*, the Ninth Circuit held that even though no "magic words" were used, a communication could still qualify as express advocacy if it was "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864. The Colorado Court of Appeals, however, rejected this construction because, among other things, it did not provide sufficiently clear notice of what is and what is not subject to regulation, and was at odds with "the narrow and cautious approach of the Colorado Supreme Court in *Common Sense Alliance v. Davidson*, 995 P.2d at 756)(when rights of free speech and association are implicated, "we must proceed with caution and with insistence upon specificity as to the circumstances under which disclosure is required.") Because *League of Women Voters* considered and specifically rejected a functional equivalency test, the ALJ will not find one to exist absent specific constitutional language invoking that test.

The Campaign Ads Are Not Express Advocacy

Applying the *Buckley*/*MCFL*/*League of Women Voters* express advocacy test to the specific ads in question, the ALJ concludes they do not expressly advocate the election of an identified candidate, and therefore are not "expenditures" within the meaning of the Colorado constitution. None of the ads use any of the words identified by *Buckley* to urge the election of any of the candidates. Nor do any of the ads use any words or phrases that are substantially similar or synonymous. The most the ads do is identify the candidate by name and picture, identify the office for which the candidate is running and what the candidate stands for, favorably present the candidate's experience and position on issues, and ask voters to contact and thank the candidate for his or her support. This type of advertising is not express advocacy. *League of Women Voters*, *supra* at 1277-78.

CEW argues that even with a narrow construction of express advocacy, the ad for State House candidate Dave Kerber meets the test because it contains the words, "Local leaders endorse Dave Kerber." The ALJ does not agree. The word "endorse" means "to approve, support, or sustain: to *endorse a political candidate*." *Random House Webster's Unabridged Dictionary* 643 (2nd ed. 2001)(*italics* in original). Although

“endorse” might be considered express advocacy if the ad exhorted the reader to support Mr. Kerber, it does not do so. It only informs the reader that other persons support Mr. Kerber. Though the ad is clearly intended to encourage the reader to vote for Mr. Kerber, it stops short of telling the reader to do so. Thus, it is not express advocacy.⁶

Summary

In summary, SMF and CLF’s campaign ads did not contain words and phrases of express advocacy. The ads were therefore not expenditures sufficient to render SMF and CLF subject to regulation as political committees.

Agency Decision

The complaint against SMF and CLF is dismissed. Because this ruling disposes of all issues raised by the complaint, the decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).⁷

Done and Signed:

November 26, 2008

ROBERT N. SPENCER
Administrative Law Judge

⁶ In *WRTL*, the Court rejected a speaker's intent as a proper measure of constitutionally protected political speech. *WRTL*, *supra* at 2669.

⁷ Because the complaint is dismissed, CEW’s pending motion to compel discovery is moot.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **AGENCY DECISION DISMISSING COMPLAINT** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and

William Hobbs
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on this ____ day of December, 2008.

Court Clerk